

74965-0

FILED
October 14, 2016
Court of Appeals
Division I
State of Washington

74965-0

NO. 74965-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAWEL ORLINSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Samuel S. Chung, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENT OF ERROR</u> | 1 |
| <u>Issue Pertaining to Assignment of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. <u>Procedural Facts</u> | 1 |
| 2. <u>Substantive Facts</u> | 2 |
| C. <u>ARGUMENT</u> | 5 |
| 1. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IT COULD INFER THE MISSING PHOTOGRAPHS WOULD HAVE BEEN FAVORABLE TO THE DEFENSE..... | 5 |
| a. <u>In Light of the Stringent Chain of Custody Required for Drug Cases, the Jury Should Have Been Instructed It Could Infer the Missing Photographs Were Unfavorable to the State.</u> | 7 |
| b. <u>The Outcome Is the Same If the State Destroyed or Deleted the Photographs.</u> | 11 |
| c. <u>The Missing Evidence Instruction Was Also Warranted as a Sanction for the State’s Discovery Violation.</u> | 13 |
| d. <u>The Improper Denial of the Missing Evidence Jury Instruction Requires Reversal</u> | 14 |
| 2. APPEAL COSTS SHOULD NOT BE IMPOSED..... | 15 |
| D. <u>CONCLUSION</u> | 17 |

TABLE OF AUTHORITIES

| | Page |
|---|-----------------|
| <u>WASHINGTON CASES</u> | |
| <u>In re Brennan</u> 117 Wn. App. 797, 72 P.3d 182 (2003)..... | 14 |
| <u>Pier 67, Inc. v. King County</u> 89 Wn.2d 379, 573 P.2d 2 (1977)..... | 12 |
| <u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000)..... | 15 |
| <u>State v. Abdulle</u> 174 Wn.2d 411, 275 P.3d 1113 (2012)..... | 6 |
| <u>State v. Blair</u> 117 Wn.2d 479, 816 P.2d 718 (1991)..... | 7, 8 |
| <u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015)..... | 16 |
| <u>State v. Campbell</u> 103 Wn.2d 1, 691 P.2d 929 (1984)..... | 7 |
| <u>State v. Clinton</u> 25 Wn. App. 400, 606 P.2d 1240 (1980)..... | 11 |
| <u>State v. Davis</u> 73 Wn.2d 271, 438 P.2d 185 (1968)..... | 6, 7, 8, 10, 14 |
| <u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008)..... | 6, 7, 8, 11 |
| <u>State v. Reed</u> 168 Wn. App. 553, 278 P.3d 203 (2012)..... | 10 |
| <u>State v. Roche</u> 114 Wn. App. 424, 59 P.3d 682 (2002)..... | 9 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|--|------|
| <u>State v. Walker</u> 136 Wn. 2d 767, 966 P.2d 883 (1998)..... | 6 |
| <u>State v. Wittenbarger</u> 124 Wn.2d 467, 880 P.2d 517 (1994)..... | 11 |
| <u>Tavai v. Walmart Stores, Inc.</u> 176 Wn. App. 122, 307 P.3d 811 (2013)..... | 12 |
| <u>FEDERAL CASES</u> | |
| <u>Arizona v. Youngblood</u> 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)..... | 7 |
| <u>Brady v. Maryland</u> 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)..... | 11 |
| <u>Kronisch v. United States</u> 150 F.3d 112 (2d Cir. 1998) | 13 |
| <u>Kyles v. Whitley</u> 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)..... | 14 |
| <u>Residential Funding Corp. v. DeGeorge Fin. Corp.</u> 306 F.3d 99 (2d Cir. 2002) | 13 |
| <u>United States v. Cardenas</u> 864 F.2d 1528 (10th Cir. 1989) | 9 |
| <u>RULES, STATUTES AND OTHER AUTHORITIES</u> | |
| 11 <u>Washington Practice: Washington Pattern Jury Instructions - Criminal</u> <u>WPIC 5.20</u> (4th ed. 2016)..... | 4, 7 |
| 2 <u>Wigmore</u> <u>Evidence in Trials at Common Law</u> § 291 | 13 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---------------------|------------|
| CrR 4.7..... | 11, 13, 14 |
| RAP 15.2..... | 16 |
| RCW 10.73.160 | 15 |

A. ASSIGNMENT OF ERROR

The court erred by refusing to give appellant's proposed "missing evidence" instruction. CP 87.

Issue Pertaining to Assignment of Error

Under the missing witness doctrine, when a party fails to produce evidence that would ordinarily be presented, the jury may infer that the evidence would be unfavorable to that party. The officer testified he took photographs of the substance seized from appellant. The chain of custody was questioned because the substance was not tested for an entire year, and the photographs showing the condition of the substance at the time were not presented to the jury. Did the court err in refusing to instruct jurors they could infer the missing photographs would be unfavorable to the State?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Pawel Orlinski with one count of possession of methamphetamine. CP 1. The jury found him guilty, and the court imposed a standard range sentence. CP 68, 93. Notice of appeal was timely filed. CP 106.

2. Substantive Facts

When police encountered Orlinski, he was visibly distraught. RP 166. When they inquired, he admitted he was depressed and thinking of harming himself. RP 167. He was pacing and crying and appeared to be responding to voices or visions that the officers could not hear or see. RP 166, 191, 196, 204. The officers heard Orlinski yell something about destroying everybody, or destroying everything. RP 167, 192, 204. Officer Nicholas Abts-Olsen testified he asked Orlinski if he used meth, and Orlinski replied that he did and had smoked some that day. RP 192-93.

Concerned for his welfare, the officers determined to have Orlinski involuntarily committed for a mental health evaluation. RP 169, 180-81. After noticing a bulge in his pockets, Officer Matthew Merritt asked if Orlinski had anything in his pockets. RP 168. Orlinski said that he had needles. RP 168. Merritt then searched Orlinski's pockets and found a glass pipe, a glass container, and a substance that appeared to be methamphetamine. RP 168. All three items were admitted as exhibits. RP 170, 176. Orlinski was taken to Harborview Hospital and was not arrested that day. RP 197. Roughly six months later, he was charged with possession of methamphetamine. RP 160-61; CP 1.

Marc Strongman, a forensic scientist at the Washington State Patrol Crime Laboratory testified he was given exhibit three, which tested positive

as methamphetamine. RP 214-15, 218. He testified that, when he received it, the red evidence tape was intact and there were no signs of tampering. RP 215. He received exhibit three for testing on February 22, 2016, the day before trial and tested it that day in a rush order. RP 219-20. When he received it, the crystalline substance was loose in a bag, not in a vial as had been reported by the officers. RP 168, 195, 220-21. Orlinski objected to Strongman's testimony on the grounds that the chain of custody for the substance was not sufficiently established. RP 216. The court overruled the objection and permitted Strongman to state his conclusion that the substance was methamphetamine. RP 217-18. Strongman testified he had no idea what had happened to the evidence at any time before his analysis of it the day before trial. RP 223-24.

At the close of the evidence, Orlinski moved again to exclude the substance that tested positive as methamphetamine on grounds the chain of custody was not sufficiently established. RP 225. Counsel pointed out that there was no evidence about whether it had been properly stored or kept safe during the year in which it was stored and then transported to the crime lab for analysis. RP 225. The court denied the motion. RP 227.

During his trial testimony, Merritt revealed for the first time that he had taken photographs of the items he took from Orlinski before packaging them. RP 183. At the close of the evidence, Orlinski moved for dismissal or

a mistrial on the grounds that the failure to disclose the photographs violated his due process rights. RP 238-39. Counsel explained Orlinski was prejudiced because the photographs were directly relevant to the contested chain of custody. RP 240-41. The court declared it was not happy with the State's handling of the discovery, but did not find substantial prejudice warranting dismissal or a mistrial. RP 240, 242.

Alternatively, Orlinski requested a missing evidence instruction patterned after the missing witness instruction, WPIC 5.20. RP 242; CP 86-87. The proposed instruction read:

If a party has failed to produce evidence that could have been presented, you may be able to infer that the evidence would have been unfavorable to a party in this case. You may draw this inference only if you find that:

- (1) The evidence is within the control of, or peculiarly available to, that party;
- (2) The issue to which that evidence is relevant is an issue of fundamental importance, rather than one that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to introduce that evidence;
- (4) There is no satisfactory explanation of why the party did not produce the evidence; and
- (5) The inference is reasonable in light of all the circumstances.

The parties in this case are the State of Washington and Pawel Orlinski.

CP 87. The court declined to give the instruction, finding it would not have been natural for the State to present the photographs. RP 248. In closing argument, counsel for Orlinski pointed out that, although Merritt said he took photographs, none were presented to the jury. RP 263. The State responded in rebuttal that the photographs were unnecessary because the State had presented the actual items themselves. RP 270.

C. ARGUMENT

1. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IT COULD INFER THE MISSING PHOTOGRAPHS WOULD HAVE BEEN FAVORABLE TO THE DEFENSE.

Merritt's photographs could have helped establish whether the substance was the same and was in the same condition when it was tested for drugs a year later. Yet the existence of the photographs was not revealed to the defense, or apparently the prosecutor, until Merritt testified at trial, and the photographs were not presented. RP 183, 238-42. Because the defense vigorously challenged the chain of custody, it would have been logical for the State to present photographs taken at the time of the incident. The court erred in denying Orlinski's request for a "missing evidence instruction," informing the jury it could infer the photographs would be unfavorable to the State.

The failure to give a warranted missing witness instruction is reversible error. State v. Davis, 73 Wn.2d 271, 280-81, 438 P.2d 185 (1968) overruled on other grounds by State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012). A trial court's refusal to give a jury instruction based on the evidence is reviewed for abuse of discretion; the refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn. 2d 767, 771-72, 966 P.2d 883 (1998). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

Here, the failure to give the requested instruction requires reversal for four main reasons. First, it would be natural and logical for the State to present the photographs to establish the chain of custody for the drugs, which are not unique or easily identifiable. The photographs were within the sole control of the State, and there was no innocent explanation for their absence. Second, the instruction was also proper if the photographs were destroyed. Third, the instruction was also proper to remedy the discovery violation. Finally, the State cannot show the error did not prejudice Orlinski's defense.

- a. In Light of the Stringent Chain of Custody Required for Drug Cases, the Jury Should Have Been Instructed It Could Infer the Missing Photographs Were Unfavorable to the State.

The “missing witness” or “empty chair” doctrine is a well-established rule permitting the jury to draw an adverse inference from the fact that a party fails to present evidence within its control. See, e.g., Montgomery, 163 Wn.2d at 598; State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting Davis, 73 Wn.2d at 276). The missing witness instruction is a standard pattern instruction when the requirements are met. Blair, 117 Wn.2d at 485-86; 11 Washington Practice: Washington Pattern Jury Instructions—Criminal, WPIC 5.20 (4th ed. 2016).

The corollary instruction for missing evidence has also been given in the past. See State v. Campbell, 103 Wn.2d 1, 18-19, 691 P.2d 929 (1984) (no constitutional error in failing to preserve police notes of interview with defendant in part because a “missing evidence” instruction “significantly aided” the defense); see also Arizona v. Youngblood, 488 U.S. 51, 60-61, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (Stevens, J., concurring) (government’s failure to preserve evidence did not require reversal in part because trial judge instructed the jury “If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest”). Indeed,

the Blair court's statement of the missing witness doctrine refers not to testimony, but to "evidence" in general. 117 Wn.2d at 385-86 (quoting Davis, 73 Wn.2d at 276). Under the doctrine, when a party fails to produce evidence that would ordinarily be presented, the jury may infer that the evidence would be unfavorable to that party. Blair, 117 Wn.2d at 485-86.

The doctrine applies when four circumstances exist: 1) it would be "logical" or "natural" for the party to present the evidence, if favorable; 2) the evidence is particularly within that party's control; 3) the evidence is material and not cumulative; and 4) its absence is unexplained. Id.; Montgomery, 163 Wn.2d at 598-99. All of these requirements were met in this case.

First, the photographs were a logical and natural part of the chain of custody for the substance that formed the backbone of the State's case. A person is a natural witness when, as a matter of reasonable probability, "the prosecution would not knowingly fail to call the witness in question unless the witness/s testimony would be damaging." Davis, 73 Wn.2d at 280. Here, the missing photographs were evidence the State would naturally want to present because of its more stringent burden to establish a proper chain of custody for the substance at issue in drug cases.

The chain of custody is particularly important in drug possession cases, where the substance is not unique or readily identifiable as being the

same or in the same condition. See, e.g., State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). In these cases, the State bears a “more stringent burden” to show it is improbable that the substance in question has been tampered with or contaminated. Id. (quoting United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir. 1989)). Factors to be considered include the “circumstances of preservation and custody.” Roche, 114 Wn. App. at 436.

Merritt’s photographs related directly to the circumstances of the preservation and custody of the items taken from Orlinski. Photographs taken at the time would have shed light on whether the items presented at trial were the same or in the same condition. Given the State’s more stringent burden under Roche to show the chain of custody, it would have been logical and natural for the State to present Merritt’s photographs if they were favorable to the State, *i.e.*, if they showed the evidence was unchanged and untampered with.

It would also have been logical and natural to present the photographs in response to the defense’s attacks on the chain of custody. The defense relied in part on the yearlong delay in testing, followed by a rush order the day before trial. RP 219-20, 223-24. It also came to light through cross examination that the substance was, at the time of testing, loose in a bag rather than in the vial described by police. RP 220-21. No evidence was presented of what may have happened to the substance during

that intervening year. RP 168, 195, 204-05, 219-20, 223-24. The photographs were directly relevant to Orlinski's argument that the chain of custody was not sufficiently established. RP 225, 233-41. The court's conclusion that the photographs were not natural evidence for the state to present was manifestly unreasonable in light of the State's more stringent burden to establish a proper chain of custody in drug cases.

Second, the photographs were exclusively within the State's control. A witness is particularly available the State when there is such "a community of interest" between the State and the witness or the State has such a "superior opportunity for knowledge of a witness" that it would be reasonably probable the State would call the witness if the testimony were favorable. State v. Reed, 168 Wn. App. 553, 572, 278 P.3d 203 (2012) (quoting Davis, 73 Wn.2d at 277). Here, the photographs were, at all times, in the control of the State. Merritt undoubtedly knew the photographs were important to the investigation, or he would not have taken the time to create them.

Third, the photographs were material and non-cumulative because they were the only objective evidence showing the condition of the alleged controlled substance at the time of the incident.

Finally, Merritt's failure to tell the prosecutor about the photographs was unexplained. The failure to present a given piece of evidence may be

sufficiently explained when, for example, the evidence would be inadmissible or when the State is unable to locate a witness. See, e.g., Montgomery, 163 Wn.2d at 599 (“[I]f the witness is not competent or if testimony would incriminate the witness, the absence is explained.”); State v. Clinton, 25 Wn. App. 400, 404, 606 P.2d 1240 (1980) (holding absence satisfactorily explained when one witness had moved and could not be found and another failed to return after the noon recess).

Here, the State failed to present any explanation for its failure to produce the photographs. Merritt testified he took them, and the prosecutor claimed he did not learn they existed until Merritt’s testimony during trial. RP 183, 239. The State failed to offer a satisfactory explanation for the destruction or concealment of the photographs, and the proposed missing evidence instruction should have been given.

b. The Outcome Is the Same If the State Destroyed or Deleted the Photographs.

The State argued at trial that there was no evidence of whether the photographs even existed any more. RP 239, 241. This argument misses the point. The State has a duty to preserve evidence and to disclose it to the defense. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)); CrR 4.7. Whether the evidence was merely concealed or outright

destroyed, the fault still belongs to the State. The speculation that the photographs were destroyed is just that – speculation. The photographs were entirely under the State’s control, and the jury would be entitled to draw the same negative inference from the State’s destruction of evidence. See Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Intentional destruction of evidence gives rise to the same unfavorable inference as the missing witness scenario:

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Id. In determining whether a negative inference is appropriate, courts in spoliation cases consider similar factors to those required for the missing witness instruction including the relevance of the evidence and whether there was an innocent explanation for the destruction. Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 135, 307 P.3d 811 (2013). Even under a spoliation analysis, there is no innocent explanation for the police destroying important chain of custody evidence in a drug case in which a more stringent showing is required and the State bears the burden of proof. Thus, even assuming the State is correct in its speculation that the evidence was destroyed, the result

is the same: the court should have instructed the jury it could infer the evidence would have been unfavorable to the State.

c. The Missing Evidence Instruction Was Also Warranted as a Sanction for the State's Discovery Violation.

Orlinski's request for the missing evidence instruction was also made in the context of a motion to dismiss or for a mistrial on the grounds that this evidence was never provided to the defense. RP 238-39. CrR 4.7 requires that all evidence in the prosecutor's possession be disclosed to the defense before trial. The second circuit has concluded that the same adverse inference instruction provided in the missing witness and spoliation of evidence contexts is also appropriate as a sanction for discovery violations. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002); Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998) (quoting 2 Wigmore, Evidence in Trials at Common Law § 291, at 228). An adverse inference instruction may be appropriate even when the violation was the result of mere negligence rather than intentional bad faith. Residential Funding Corp., 306 F.3d at 101.

It is of no moment that the prosecutor was apparently surprised to learn of the existence of these photographs at trial. "[A] prosecutor has the duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police."

In re Brennan, 117 Wn. App. 797, 804, 72 P.3d 182, 185 (2003) (citing Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Moreover, counsel for Orlinski specifically requested any photographs pertaining to the case in his notice of appearance. Supp. CP¹ ___ (sub no. 6, Notice of Appearance, Aug. 28, 2015). This should have triggered the prosecutor's duty to learn of and disclose any photographic evidence. The failure to do so violated the prosecutor's obligations under CrR 4.7 and justified a jury inference that the photographs would have been favorable to Orlinski.

d. The Improper Denial of the Missing Evidence Jury Instruction Requires Reversal.

The failure to give a warranted missing witness instruction is reversible error. Davis, 73 Wn.2d at 280-81. As discussed above, the case charging Orlinski with possession of a controlled substance rested entirely on the identity of the substance taken from Orlinski's pocket. If it was not actually methamphetamine, or if the substance that tested as methamphetamine was not the same as the substance taken from Orlinski's pocket, then no crime was committed. Thus, the chain of custody for the evidence was a critical question.

The State failed to produce the photographs that could have demonstrated the condition of the evidence at the time. The jury should have

¹ A supplemental designation of clerk's papers was filed on October 12, 2016.

been able to infer that the photographs would have further undermined the chain of custody. The missing evidence inference must be viewed in combination with the evidence that the State had the substance in its custody for a year without testing it, and the absence of any evidence as to what may have happened to the evidence during that intervening year. It appears from the jury's inquiry that it was already concerned about the length of the delay. CP 88 (jury inquiry asking "Why did it take so long to test the drugs?"). If the jury had been properly instructed that it could draw an inference against the State based on the State's failure to produce photographs that, there is a reasonable probability that it would have declined to find beyond a reasonable doubt that Orlinski actually possessed methamphetamine.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Orlinski indigent and entitled to appointment of appellate counsel at public expense. CP 103. If Orlinski does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Orlinski’s ability to pay must be determined before discretionary costs are imposed. At the time of this offense, Orlinski appeared to be homeless and struggling with addiction. RP 182. His financial declaration listed no assets and no income. CP 100. The court found he could contribute nothing to the costs of this appeal. CP 103. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Orlinski has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

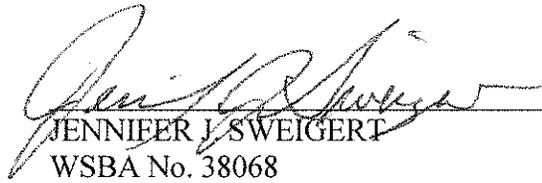
D. CONCLUSION

For the foregoing reasons, Orlinski requests this Court reverse his conviction.

DATED this 13th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorney for Appellant